No. 86-922

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

Petitioners,

vs.

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the language of Rule 4(a)(4), F.R.A.P., which provides that a notice of appeal filed before disposition of a motion under Rule 59(e), Fed. R. Civ. P., "shall have no effect," is also applicable to a notice of appeal filed before disposition of a motion under Rule 60(b), Fed. R. Civ. P., when the latter motion — clearly designated as such — is made within ten days of the entry of judgment, even though there is no mention of Rule 60(b) in the text of Rule 4(a)(4)?

2. Whether the District Court had jurisdiction to enter a second "final" judgment for monetary sanctions against petitioners-attorneys after that court had already entered final judgment dismissing the case and an appeal had been taken from the latter judgment to the Court of Appeals?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Citations ii

Opinions Below 2

Jurisdiction 2

Statement of the Case 2

The Facts 3

Reasons for Granting the Writ:

I. The District Court lacked authority to enter a second final judgment. In any event, petitioners-attorneys' Rule 60(b) motion did not affect the finality of that purported judgment and Rule 4(a)(4), F.R.A.P., therefore has no application..... 6

II. The notice of appeal from the second final judgment was timely filed..... 11

Conclusion 14

TABLE OF CITATIONS

Cases Cited:

Alley v. Dodge Hotel, 501 F. 2d 880 (D.C. Cir. 1974) ... 13

Contents

Page

A.D. Heiss Lithograph v. Illinois Adhesive Products Co., 705 F. 2d 248 (7th Cir. 1983) 9

Bank of California, N.A. v. Arthur Andersen Co., 709 F. 2d 1174 (7th Cir. 1983) 9

Daily Mirror, Inc. v. New York News, Inc., 533 F. 2d 53 (2d Cir. 1976) 10

Foman v. Davis, 371 U.S. 178 (1962) 13

Harcon Barge I, 746 F. 2d 278 (5th Cir. 1984) 10

Harcon Barge II, 784 F. 2d 665 (5th Cir. 1986) 10

Lairsey v. Advance Abrasives Co., 542 F. 2d 928 (5th Cir. 1976) 9, 11

Lyell Theatre Corp. v. Loews Corp., 682 F. 2d 37 (2d Cir. 1982) 10

Rand, et al. v. Anaconda-Ericsson, Inc., et al., 623 F. Supp. 176 (E.D.N.Y. 1985), aff'd, 794 F. 2d 843 (2d Cir. 1986) 2, 3

Ryan v. U.S. Lines Co., 303 F. 2d 430 (2d Cir. 1962) 11

Smith v. U.S. Parole Commission, 721 F. 2d 346 (11th Cir. 1983) 9

Standard Oil Co. of California v. United States, 429 U.S. 17 (1976) 10

Contents

Page

United States v. Hitchmon, 587 F. 2d 1357 (5th Cir. 1979) 8

United States v. Mendoza, 491 F. 2d 534 (5th Cir. 1974) 8

United States v. 1982 Sanger 24' Spectre Boat, 738 F. 2d 1043 (9th Cir. 1984) 9

Venable v. Haislip, 721 F. 2d 297 (10th Cir. 1983) 9

Vreeken v. Davis, 718 F. 2d 343 (10th Cir. 1983) 9

Willie v. Continental Oil Co., 746 F. 2d 1041 (5th Cir. 1984) 10

Statute Cited:

28 U.S.C. § 1254(1) 2

Rules Cited:

Federal Rules of Appellate Procedure:

Rule 3(c) 12

Rule 4(a)(1) 6

Rule 4(a)(4) ..... i, 6, 7, 8

Rule 4(a)(4)(iii) 8

Contents

Page

Federal Rules of Civil Procedure:

Rule 50(b) 6, 9

Rule 52(b) 6, 9

Rule 59 ..... 4, 10, 11, 12

Rule 59(b) 6

Rule 59(e) ..... i, 2, 6, 7, 8, 9, 10

Rule 60 9

Rule 60(a) 10

Rule 60(b) ..... i, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12

Rule 60(b)(4) 4, 7

Other Authorities Cited:

9 J. Moore, Federal Practice, § 203.11 8

11 Wright & Miller, Federal Practice and Procedure, § 2873 ..... 10, 11

16 Wright & Miller, Federal Practice and Procedure, §3949 (1977) 8, 12

APPENDIX

Appendix A—First Final Judgment Dated January 30, 1986 Filed January 31, 1986 ..... 1a

Contents

Page

Appendix B—District Court's Memorandum and Order Dated February 28, 1986 ..... 2a

Appendix C—Second Final Judgment Dated March 6, 1986, Entered March 7, 1986 ..... 11a

Appendix D—District Court's Endorsed Order Dated March 17, 1986, Entered March 25, 1986 ..... 13a

Appendix E—Endorsed Order of the District Court Dated April 8, 1986 Denying Petitioners-Attorneys' Request for Rule 60(b) Relief 15a

Appendix F—Stipulation of Voluntary Dismissal of Petitioners-Attorneys' Appeal, Dated April 28, 1986, "So Ordered" by the Court of Appeals 17a

Appendix G—Notice of Reinstatement of Appeal Filed July 28, 1986 ..... 20a

Appendix H—Order of the Court of Appeals' Dismissing Petitioners-Attorneys' Appeal Filed September 2, 1986 ..... 22a

No.

In The

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October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

Petitioners,

vs.

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners-attorneys respectfully pray that a writ of certiorari issue to review the order of a motion panel of the United States Court of Appeals for the Second Circuit dismissing petitioners-

attorneys' appeal from a judgment for monetary sanctions entered against them on March 7, 1986.

OPINIONS BELOW

Relevant decisions of the District Court and the Court of Appeals are reported at 623 F. Supp. 176 (E.D.N.Y. 1985), *aff'd*, 794 F. 2d 843 (2d Cir. 1986). In addition, the District Court's memorandum and order, dated February 28, 1986, assessing the amount of fees and costs to be awarded against petitioners-attorneys, is annexed as Appendix B. The District Court's order, dated March 17, 1986, denying petitioners-attorneys' Rule 59(e) motion is annexed as Appendix D. The order of the District Court, dated April 8, 1986, denying petitioners-attorneys' request for Rule 60(b) relief is annexed as Appendix E. The order of the Court of Appeals' motion panel dismissing petitioners-attorneys' appeal, filed September 2, 1986, is annexed as Appendix H.

JURISDICTION

The order of the Court of Appeals' motion panel summarily dismissing petitioners-attorneys' appeal from the second "final" judgment entered in this case is dated September 2, 1986 (Appendix H). In a companion case before this Court, Docket No. 86-598, petitioners-attorneys have also petitioned for certiorari with regard to the first final judgment entered in this matter and particularly with respect to the injunction entered as a sanction against petitioners-attorneys by the District Court for alleged "bad faith" litigation.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners-attorneys represent a group of shareholders who

own stock in Teltronics Services, Inc., a bankrupt corporation. Petitioners-attorneys' clients filed a class action suit in the Eastern District of New York on September 23, 1983, alleging an anticompetitive conspiracy by respondents to seize the assets of Teltronics by forcing that company into bankruptcy by means of, among other things, the publication — during negotiations with respondent Ericsson for Teltronics' acquisition — of misleading and deceptive press releases across the Dow-Jones broad tape which duped Teltronics' shareholders into selling their shares of stock. The details of plaintiffs' claims are set forth in the companion petition for certiorari, referred to above, which deals with the first final judgment entered in the action.

THE FACTS

On November 15, 1983, respondents moved — before joinder of issue — for summary judgment. By memorandum and order dated August 30, 1985, the District Court granted respondents' motion, *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985), and in doing so, also granted respondents' motion for sanctions against petitioners-attorneys (relating to the *commencement* of the action) on the ground that the latter had allegedly demonstrated "bad faith" in opposing respondents' summary judgment motion. According to the District Court, petitioners-attorneys, rather than opposing the motion on their clients' behalf, should instead have agreed to the entry of judgment against those clients, thus saving respondents "the costs and fees of preparing additional papers." An injunction was then entered by the court against petitioners-attorneys, without a hearing, permanently enjoing them (and their clients) from pursuing "any new or pending litigation" which "concerns Teltronics Services, Inc."[1]

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1. None of the plaintiffs in this action was ever a party or a privy of any party to any other litigation involving Teltronics, past or present, and the District Court conceded that *res judicata* was not an issue in the case.

Petitioners-attorneys moved for reargument, requesting a specification of the findings of alleged "bad faith" litigation leveled at them and for the opportunity to be heard at an evidentiary hearing. On December 2, 1985, the District Court denied petitioners-attorneys' motion and gave respondents 20 days to submit a fee petition. Prior to the court's determining the amount of sanctions to be awarded, however, plaintiffs filed a notice of appeal from the court's August 30, 1985 and December 2, 1985 orders. In addition, on January 31, 1986, the court entered its first final judgment dismissing the action (Appendix A). At plaintiffs' request, the record in the case was also transmitted to the Court of Appeals on February 6, 1982.[2]

Thereafter, however, on February 28, 1986, the District Court ruled on respondents' fee petition and imposed liability on petitioners-attorneys in the sum of $20,000 (Appendix B). Petitioners-attorneys then moved for reargument and for Rule 59(e) relief. During the pendency of the latter motion, the second judgment was entered in the action (Appendix C, dated March 6, 1986 and entered March 7, 1986). Petitioners-attorneys immediately (to avoid having a personal judgment against them on file in the courts) moved to vacate that judgment under Rule 60(b)(4) (void judgment) alleging that the District Court, after the filing of a notice of appeal in connection with the first final judgment, had been ousted of jurisdiction in the case.

While the Rule 60(b) motion was awaiting decision, petitioners-attorneys' Rule 59 motion was denied by the court. Once the Rule 59 motion had been disposed of, petitioners-attorneys filed a notice of appeal from the court's February 28,

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2. Petitioners-attorneys claim that the filing of their notice of appeal ousted the District Court of jurisdiction in the matter and that court's subsequent orders, other than those in aid of the appeal, were null and void, including the entry of the second judgment for monetary sanctions.

1986 order and from the March 7, 1986 (second) final judgment entered thereon (Appendix H).[3]

Petitioners-attorneys' Rule 60(b) motion was denied by the court on April 8, 1986 (Appendix E). Shortly thereafter, at a conference with Staff Counsel for the Court of Appeals on April 28, 1986, the parties stipulated in writing (Appendix F), and the Court of Appeals "so ordered," the voluntary dismissal of petitioners-attorneys' appeal from the second judgment pending the outcome of the appeal taken from the first judgment in the case.

The Court of Appeals affirmed the entry of the first final judgment on July 9, 1986, 794 F. 2d 843. Thereafter, petitioners-attorneys reinstated their appeal from the second final judgment

---

3. Forms C and D were served and filed pursuant to the Second Circuit's local rules on April 10, 1986. These forms outlined the following issues for consideration by the Court of Appeals:

> 1. Did the district court err in assessing, without a hearing, $20,000.00 in sanctions against plaintiffs' attorneys for alleged "bad faith" litigation?
>
> 2. Did the district court err in assessing sanctions against plaintiffs' attorneys without a proper evidentiary basis and based solely on the court's subjective impression concerning what a reasonable fee should have been?
>
> 3. Did the district court violate plaintiffs' attorneys' constitutional rights (and the rights of their clients) in assessing sanctions against plaintiffs' attorneys?
>
> 4. Did the district court have jurisdiction to enter a second judgment in the action against plaintiffs' attorneys after the court had already entered a final judgment in the action?
>
> 5. Was the defendants' alleged right to attorneys' fees waived by entry of final judgment in the case?

by the service, on July 28, 1986, of a "Notice of Reinstatement of Appeal" (Appendix G). The notice was sent to all parties, filed with the Court of Appeals, and transmitted to the District Court for docketing.

On August 21, 1986, respondents moved to dismiss the appeal on the ground that petitioners-attorneys' notice of appeal had not been timely filed. According to respondents, since petitioners-attorneys' Rule 60(b) motion (clearly designated as such) had been served within the ten day period for making Rule 59(e) motions, petitioners-attorneys' notice of appeal filed before disposition of the Rule 60(b) motion was void and of no effect.

A motion panel of the Court of Appeals granted respondents' motion on September 9, 1986, summarily dismissing petitioners-attorneys' appeal. There was no opinion.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT LACKED AUTHORITY TO ENTER A SECOND FINAL JUDGMENT. IN ANY EVENT, PETITIONERS-ATTORNEYS' RULE 60(b) MOTION DID NOT AFFECT THE FINALITY OF THAT PURPORTED JUDGMENT AND RULE 4(a)(4), F.R.A.P., THEREFORE HAS NO APPLICATION.

Subdivision (1) of Rule 4(a), F.R.A.P., provides that a notice of appeal in a civil case, where an appeal is taken as of right, shall be filed within 30 days after entry of the judgment or order appealed from. However, subdivision (4) of the Rule provides that where a timely motion is made under Rules 50(b), 52(b), 59(b) or 59(e), Fed. R. Civ. P., the time for appeal runs from the entry of the order granting or denying the motion.

In August 1985, the District Court granted summary judgment dismissing the complaint, awarded sanctions for alleged "bad faith" litigation against petitioners- attorneys, and enjoined them from further prosecuting the action. Final judgment was entered on January 31, 1986. After a notice of appeal had been filed, the District Court entertained respondents' petition regarding the *amount* of sanctions to be awarded. It subsequently entered a second final judgment on March 7, 1986 in the sum of $20,000 (Appendix C).

With respect to this second final judgment, petitioners-attorneys made two separate motions. One was a Rule 59(e) motion, which was denied. The second was a motion under Rule 60(b)(4) to declare the second final judgment void for lack of jurisdiction. It too was denied.

Respondents argued in the Court of Appeals that despite the fact that petitioners-attorneys had already made a motion under Rule 59(e), their Rule 60(b) motion (plainly designated as such) must also be treated as a (second) motion under Rule 59(e) since it had been made within 10 days of entry of the second final judgment. Respondents were clearly wrong.

Rule 4(a)(4) does not mention or refer to Rule 60(b) in its recital of the kind of motions affected by it. Indeed, Rule 60(b) expressly provides that a motion made under that section "does not affect the finality of a judgment or suspend its operation."[4]

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4. Rule 60(b) states:

> "The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) *does not affect the finality of a judgment or suspend its operation*" (emphasis added).

In addition, Rule 4(a)(4)(iii) limits the application of Rule 59(e) to efforts to "alter or amend" the judgment. Petitioners-attorneys in making their Rule 60(b) motion were clearly not attempting to "alter or amend" the (second) judgment. On the contrary, they sought a determination that the judgment of March 7, 1986 was void and non-existent in view of the fact that the filing of their notice of appeal from the first final judgment (which judgment involved the award of sanctions but not the amount thereof) had ousted the District Court of jurisdiction. Accordingly, the court had no power to enter a second judgment on the subject of the amount of sanctions to be awarded. *See* 9 J. Moore, *Federal Practice,* § 203.11 (the filing of a notice of appeal divests the District Court of authority to proceed except for matters in aid of the appeal or to correct clerical mistakes); *see also,* 16 Wright & Miller, *Federal Practice and Procedure,* § 3949 at 358-59 (1977) ("So complete is this transfer of jurisdiction that any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal"); *United States v. Hitchmon,* 587 F. 2d 1357, 1359 (5th Cir. 1979) ("The appeal is pending once the notice of appeal is filed—and during its pendency the district court has only a very limited power to act with respect to the matters appealed").[5]

Moreover, there is no 10-day limitation on the making of a Rule 60(b) motion as there is in the case of the other motions which come under the aegis of Rule 4(a)(4). Indeed, Rule 60(b) itself makes no mention of the period within which a motion to declare a judgment void must be made after a notice of appeal has been filed. Instead, it sets up an outside limit of one year

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5. A federal appellate court is also required to examine the basis of its jurisdiction, *sua sponte* if necessary. *United States v. Mendoza,* 491 F. 2d 534, 536 (5th Cir. 1974).

prescribing a "reasonable time" standard which invites a flexible application in varying circumstances.[6] *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930 (5th Cir. 1976).

Great confusion exists among the various Circuit Courts regarding the treatment of post-judgment motions involving Rules 59(e) and 60(b). For example, motions for reconsideration have been characterized as either motions under Rule 59(e), F. R. Civ. P., *see e.g., A.D. Heiss Lithograph v. Illinois Adhesive Products Co.*, 705 F. 2d 248, 249-50 (7th Cir. 1983) (*per curiam*), or as motions under Rule 60(b). Some courts consider the substance of a motion in determining whether a post-judgment motion is one to alter or amend a judgment under Rule 59(e) or a motion for release from judgment under Rule 60(b). *United States v. 1982 Sanger 24' Spectra Boat*, 738 F. 2d 1043 (9th Cir. 1984); *Smith v. U.S. Parole Commission*, 721 F. 2d 346, 348 (11th Cir. 1983); *Bank of California, N.A. v. Arthur Andersen Co.*, 709 F. 2d 1174, 1176 (7th Cir. 1983). Other courts consider *any* motion made within ten days of the entry of judgment to be a motion to alter or amend that judgment. *Venable v. Haislip*, 721 F. 2d 297, 299 (10th Cir. 1983); *Vreeken v. Davis*, 718 F. 2d 343, 345 (10th Cir. 1983).

This lack of coherence is a trap for the unwary as the instant case demonstrates. Although on at least two occasions the Second Circuit has dealt with the issue of whether a motion to amend a judgment should be considered as a motion made under Rule 59(e) or under Rule 60, no definitive rule has been developed.

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6. *See* footnote 4, *supra*. Rule 59(b) and 59(e) require a motion for a new trial and a motion to alter or amend a judgment to be "served not later than 10 days after entry of the judgment." Rule 50(b) requires a motion for judgment n.o.v. to be "moved for" not later than 10 days after entry of judgment. Rule 52(b) provides that a motion to amend or make additional findings of fact must be "made" not later than 10 days after entry of judgment.

Such guidance that exists points to the conclusion that the Second Circuit will look to the substance of the motion to determine how a particular motion should be treated. *Lyell Theatre Corp. v. Loews Corp.*, 682 F. 2d 37, 41 (2d Cir. 1982); *Daily Mirror, Inc. v. New York News, Inc.*, 533 F. 2d 53 (2d Cir. 1976). On the other hand, in dismissing petitioners-attorneys' appeal in the present case, the Court of Appeals — without an opinion — appears to have adopted, *sub silentio*, the rule set forth by the Fifth Circuit in *Harcon Barge II*, 784 F. 2d 665 (5th Cir. 1986), a rule which was finally settled only after a rehearing *en banc* was held to resolve a conflict between *Harcon Barge I*, 746 F. 2d 278 (5th Cir. 1984)[7] and *Willie v. Continental Oil Co.*, 746 F. 2d 1041 (5th Cir. 1984). *Harcon Barge II* held that *any* post-judgment motion to alter or amend a judgment served within ten days after entry of judgment, other than a motion to correct purely clerical errors covered by Rule 60(a) — but including a motion made under Rule 60(b) — falls within the scope of Rule 59(e) and must, however designated by the movant, be considered a Rule 59 motion for purposes of Rule 4(a)(4), F.R.A.P.

Such a conclusion is, it seems, flatly contrary to the position taken by numerous other Circuits, including as noted, that of the Second Circuit prior to the instant dismissal. It also appears to be contrary to the expressly recognized power in the District Courts to consider on the merits and to grant or deny[8] a Rule

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7. *Harcon Barge I* was itself an attempt to resolve two conflicting determinations by separate Fifth Circuit motion panels.

8. While originally the District Courts were required to obtain leave of a court of appeals before *granting* (as opposed to denying) a Rule 60(b) motion, 11 Wright & Miller, *Federal Practice and Procedure*, § 2873 at p. 263, this Court has now ruled that such leave is no longer necessary. *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976) ("The appellate-leave requirement adds to the delay and expense in litigation and also burdens the increasingly scarce time of the federal appellate courts").

60(b) motion filed after a notice of appeal has been timely filed. 11 Wright & Miller, *Federal Practice and Procedure*, § 2873 at pp. 265-266; *Ryan v. U.S. Lines Co.*, 303 F. 2d 430, 434 (2d Cir. 1962); *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930 (5th Cir. 1976).

This procedural conflict — important to the rights of petitioners-attorneys and to the rights of litigants in the federal system generally — urgently calls for this Court's attention and resolution.

II.

THE NOTICE OF APPEAL FROM THE SECOND FINAL JUDGMENT WAS TIMELY FILED.

Petitioner-attorneys' Rule 60(b) motion was denied on April 8, 1986 and an order to that effect was entered on April 16, 1986. Assuming that respondents' argument is correct and that the motion was equivalent to a Rule 59 motion, petitioners-attorneys had 30 days from April 16 within which to file a notice of appeal. On April 28, 1986, at a conference with staff counsel for the Second Circuit, well within this 30-day period, the parties to the lawsuit stipulated to, and the Court of Appeals "so ordered", the voluntary dismissal of petitioners-attorneys' appeal subject to its reinstatement within 20 days from the date of determination of the then pending appeal from the first judgment entered in the action.[9] Petitioners-attorneys' appeal from the second final judgment was thereafter reinstated by their "Notice of Reinstatement of Appeal" dated July 28, 1986, which was sent to all parties, filed with the Second Circuit, and transmitted to the District Court for docketing. A statement of the issues raised

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9. Such other appeal, as noted, is still pending in this Court at this moment, with a petition for a writ of certiorari, Docket No. 86-598, October 1986 Term.

on appeal was also set forth in Forms C and D under the Second Circuit's appellate rules, served and filed with the Court of Appeals on April 10, 1986.

Accordingly, under the circumstances of this case even if petitioners-attorneys' Rule 60(b) motion were properly to be treated as a (second) Rule 59 motion, petitioners-attorneys have still filed a timely notice of appeal within the meaning of Rule 3(c), F.R.A.P., which provides that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." The Advisory Committee Notes to that rule explain the significance of the quoted language as follows:

> "[I]t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. *See e.g., Cobb v. Lewes,* (C.A. 5th, 1974) 488 F.2d 41; *Holley v. Capps,* (C.A. 5th, 1974) 468 F.2d 1366. The proposed amendment would give recognition to this practice."

The courts have therefore recognized a host of substantial equivalents to the formal act of filing a proper written notice of appeal with the court. The thrust of these decisions is that, given a failure to abide by that simple requirement, an effective substitute only requires some sort of entry on the written record that might reasonably be construed as a notice of appeal and which in fact gives notice to the courts and the other parties of the intention to appeal from a particular judgment. 16 Wright & Miller, *Federal Practice and Procedure,* § 3949 at pp. 356-358 (1977).

> "[I]t is clear beyond cavil that Appellate Rules 3

> and 4 tolerate a common sense approach to timely filing, and do not insist upon 'literal compliance in cases in which it cannot fairly be exacted. . .' We think a filing requirement is met by a positive, substantial and unequivocal effort to discharge it. . . We agree with the Fifth Circuit that 'it would . . . be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty on justice, to hold that the extremely simple procedure required by the (Rules) is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with (them) defeats substantial rights.' " *Alley v. Dodge Hotel,* 501 F. 2d 880, 884 (D.C. Cir. 1974).

Or as this Court phrased it in *Foman v. Davis,* 371 U.S. 178, 181 (1962):

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits'. . ."

The notice of appeal was, under the circumstances of this case, timely filed.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

CARL E. PERSON
Counsel of Record
WALTER C. REID
Attorneys for Petitioners

APPENDIX A—FIRST FINAL JUDGMENT DATED JANUARY 30, 1986 FILED JANUARY 31, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 83 4268 (ERN)

MICHAEL M. RAND

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC.

Defendants.

JUDGMENT

A order of Honorable Edward R. Neaher, United States District Judge, having been filed on August 30, 1985, dismissing the plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff's complaint is dismissed.

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
January 30, 1986

APPENDIX B—DISTRICT COURT'S MEMORANDUM AND ORDER DATED FEBRUARY 28, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE CO., NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Defendants.

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Attorneys for Defendants Anaconda-Ericsson, Inc., Ericsson, Inc., L.M. Ericsson Telephone Co., Sullivan & Cromwell, Richard R. Howe, Richard G. Lyon, and L. Stanton Towne
By: ROBINSON B. LACY, ESQ.

Appendix B

WHITE & CASE
New York, New York
Attorneys for Nordic American Bank
By: ALLAN L. GROPPER, ESQ.

MEMORANDUM AND ORDER

NEAHER, District Judge.

This case is before the Court upon the fee petitions of defendants Anaconda-Ericsson and Nordic American Bank, pursuant to the Court's award of attorneys fees as a sanction against plaintiffs' attorneys. *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176, 191 (E.D.N.Y. 1985). Although the Court imposed this sanction as part of its inherent equitable power to deal with plaintiffs' attorneys bad faith conduct, *Tedeschi v. Smith Barney*, etc., 579 F. Supp. 657, 661 (S.D.N.Y. 1984), *aff'd* 757 F. 2d 465 (2d Cir. 1985) (per curiam), the parties cite Fed. R. Civ. P. 11, which provides in relevant part (effective August 1, 1983),

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . If a pleading, motion, or other paper is signed in violation of this rule, the

> court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

On behalf of the firm of Sullivan & Cromwell, attorney Robinson Lacy has submitted papers in support of a request of $48,000 for 254.5 hours of time (Richard Howe, 2.25 hours; Robert Osgood, 3.5 hours; Robinson Lacy, 110.75 hours; Maria Foscarinas, 113.75 hours; and law clerk and paralegals, 24.25 hours) and $7,842.30 in disbursements, all of which Ericsson has agreed to pay. Likewise, on behalf of the firm of White & Case, which represents defendant Nordic American Bank, attorney Allan L. Gropper has submitted papers in support of a request of $3,506 for 20.5 hours of time (Allan L. Gropper, 5.3 hours; Robert J. Morrow, 15.2 hours) and $95.30 in disbursements. Lacy also asks the Court to determine the conditions of a stay pending plaintiffs' attorneys' appeal of the award of fees, requesting that they post a supersedeas bond for 111% of the amount of the award pursuant to Fed. R. Civ. P. 62 and local civil rule 42.

In response, plaintiffs' attorneys object to the adequacy of the documentation and the legitimacy of imposing various charges and expenditures upon them. They also contend that defendants have not identified hours specifically devoted to their acts of bad faith conduct and have not identified hours so as to permit the Court to establish different rates for different taks. Further, they charge that much of Ericsson's attorneys' hours are duplicative, that Nordic's attorneys' hours are entirely duplicative of Ericsson's

attorneys' hours, and that Sullivan & Cromwell has failed to identify hours spent defending itself as opposed to defending Ericsson. They ask for a hearing and discovery related to these objections.

In response to the Court's order of December 2, 1985 and prior to the filing of the fee petition, plaintiffs' attorneys filed a notice of appeal, which set in motion the processing of the appeal even though no judgment dismissing the complaint has been entered. The Clerk of the Court eventually entered a judgment. In the interim the parties had filed the instant papers relevant to the amount of the sanction. Apparently not pleased with the potential of confronting two appeals, one concerning the dismissal of the complaint and the award of sanctions and the other concerning the amount of the sanction, Lacy moved the Court of Appeals to adjourn the briefing and argument schedule for the appeal, which motion was

> "denied without prejudice to renewal upon a showing that the District Court has, within a reasonably prompt time, determined the amount of attorneys' fees to be assessed against plaintiff and its counsel."

For clarification of the record, this Court has awarded a sanction only against plaintiffs' attorneys. 623 F. Supp. at 185.

In its discretion, the Court could await the outcome of the appeal and then determine the amount of the sanction, a prudent course in light of the possibility, always present in appellate review, that the Court of Appeals may reverse the dismissal of the complaint, thereby rendering the issue of the amount of the sanction moot. However, to take advantage of the potential for

final resolution of this case through consolidation of appeals, and upon consideration of the papers submitted, the Court finds no reason to delay further its ruling on the amount of the sanction.

Moreover, a response to each of plaintiffs' attorneys many objections addressed to the fee petition would entail considerable expenditure of judicial resources and would result in a second major and unjustified litigation, *see Hensley v. Eckerhart,* 103 S. Ct. 1933, 1941 (1983), and more importantly, would shift the focus of this matter away from the law relevant to the imposition of sanctions. Simply put, in determining the amount of a sanction, including the award of attorney's fees for bad faith conduct, the Court is not bound by the contents of the fee petition.

> "[R]ule 11 only authorizes 'reasonable' fees, not necessarily actual fees. Thus, '[t]he assessment of fees against a nonprevailing litigant must be fair and reasonable based upon the particular circumstances of the case.' *Tedeschi v. Smith Barney, Harris Upham & Co., Inc.,* 579 F. Supp. 657, 664 (S.D.N.Y. 1984) (case arose while old rule 11 was still in effect). The court in *Tedeschi* found that sanctions were proper, but only allowed the defendant to recover $10,000 of the $49,235.75 attorneys's fee bill."

United Food & Commercial Workers v. Armour and Co., 106 F.R.D. 345, 349 (N.D. Cal. 1985).

> "Any award is limited by the rule to 'the reasonable expenses incurred * * * including a reasonable attorney's fee.' Thus the measure is not actual expenses and fees but those the court

> determines to be reasonable. Proof of the expenses and fees actually incurred will be helpful to the court's determination, but the award will be based on what is found to be reasonable. A party having vigorously resisted a baseless claim may therefore find that the court, in making an award, will consider its expenditures to have been excessive.
>
> "While the determination of attorney's fees should be guided by reference to factors commonly used by federal courts for that purpose, and be supported by findings, the court should observe the Advisory Committee's caution to avoid satellite litigation, particularly additional discovery, and attempt to make its decision on the basis of the record, augmented by appropriate declarations."

Schwarzer, *Sanctions Under the New Federal Rule 11*, 104 F.R.D. 181, 203 (1985) (footnotes to case citations omitted) (the author is a judge in the Northern District of California).

Cognizant of the appropriate standard, then District Judge and now Circuit Judge Miner considered an application for sanctions by Sullivan & Cromwell against a *pro se* plaintiff in *Taylor v. Prudential-Bache Securities, Inc.*, 594 F. Supp. 226 (N.D.N.Y. 1984), *aff'd* 751 F. 2d 371 (2d Cir. 1984). In granting the application, he reduced the requested amounts for fees by 1/2 and 2/3, noting of one of the cases involved,

> "This action was not only of the shortest duration, involving less than one hundred hours, but Sullivan & Cromwell was performing services on behalf of itself as a defendant and so would not normally

be remunerated at the rate it bills its clients."

Id. at 229. Most significantly, he also stated,

> "While it appears that counsel's bottom-line request has taken into account the facts the Court is itself concerned with, and while the Court views the request as both a realistic and reasonable one, it will nonetheless reduce the award substantially."

Id. at 228-29 (citation omitted). Logically, therefore, objections addressed to a fee petition, in the context of an award of fees as a sanction, offer little guidance for the appropriate amount of the sanction in light of the circumstances and the record of the case. A disposition of the merits of each of plaintiffs' attorneys' objections to the fee petition would not necessarily move the record closer to establishing the reasonable amount of effort responsive to their bad faith conduct. Consequently, the Court may determine the amount of the sanction in a particular case with regard to its familiarity with the case and its knowledge of what would be a reasonable expenditure of effort to respond appropriately to an attorney's bad faith conduct in that case.

Additionally, an award of an amount less than that actually expended would not cast doubt upon the veracity of the amount requested in the fee petition. For example, in this case, Lacy could not have been certain that the Court would view plaintiffs' attorneys' conduct in responding to defendants' motion for summary judgment as evidencing bad faith. As a result, and in keeping with his professional obligations, he would respond to their opposing papers even if he felt that such papers were unnecessary. The Court has raised this illustration primarily to respond to plaintiffs' attorneys' argument that, in essence,

defendants' reply papers, the preparation of which accounts for a sizeable share of the requested hours, add little to the original moving papers. In preparing those papers, consulting with co-counsel, and engaging in other activities in defense of this litigation after March 22, 1985, defendants' attorneys did not have the benefit of the Court's views concerning the lack of merit and frivolity of plaintiffs' attorneys' conduct until August 30, 1985.

Plaintiffs' attorneys' remaining arguments are either makeshift or not appropriately raised at this late date. The Court has already explained that the determination to award a sanction was made in a manner consistent with the notice and opportunity to be heard required by the due process clause of the Fifth Amendment. Without citation to authority, they demand a "jury trial on the issue of the assessment of damages under the 7th Amendment to the U.S. Constitution." In awarding sanctions, the Court is the trier of fact, which in this case has been determined on the papers of record. Finally, their contention concerning the right to counsel under 28 U.S.C. § 1654 is meritless. The Court has done absolutely nothing to prevent plaintiffs' attorneys from retaining independent counsel.

In response to defendants' contentions concerning a stay and the posting of a bond, plaintiffs' attorneys contend that the issue is premature. Although plaintiff's attorneys have not affirmatively stated that they are not requesting or have not requested a stay of the Court's award of a sanction, the record discloses that no such application has been made. Under Fed. R. Civ. P. 62(d), which provides,

> "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this

> rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.",

the court obviously cannot approve a bond which has not yet been submitted. Moreover, the notice of appeal may not be filed until the entry of this order. The Court regards defendants' arguments as addressing matters anticipated in the future in a manner designed to avoid the submission of additional papers.

In the interests of justice, and after considering all the relevant factors and circumstances with regard to the punitive nature of a sanction, as tempered by the aim of not chilling legitimate efforts to prosecute claims, the Court imposes liability upon plaintiffs' attorneys, jointly and severally, for $1,500 to defendant Nordic American Bank and $18,500 to defendant Anaconda-Ericsson, Inc.

Copies of this memorandum and order are being forwarded to counsel for the parties.

SO ORDERED.

s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
February 28, 1986

APPENDIX C—SECOND FINAL JUDGMENT DATED MARCH 6, 1986, ENTERED MARCH 7, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 83 4268 (ERN)

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE CO., NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Defendants.

JUDGMENT

A judgment having been entered on January 30, 1986 dismissing the complaint prior to a decision on the defendants' Anaconda-Ericsson and Nordic American's fee petitions and a memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on February 28, 1986, imposing liability upon plaintiffs' attorneys, jointly and severally, for $1,500 to defendant Nordic American Bank and $18,500 to defendant Anaconda-Ericsson, Inc., it is

Appendix C

ORDERED and ADJUDGED that liability is imposed upon the plaintiffs' attorneys, jointly and severally, for $1,500 to the defendant, Nordic American Bank and for $18,500 to the defendant, Anaconda-Ericsson, Inc.

ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
March 6, 1986

APPENDIX D—DISTRICT COURT'S ENDORSED ORDER DATED MARCH 17, 1986, ENTERED MARCH 25, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 Civ. 4268 (ERN)

MICHAEL M. RAND, et al.,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., et al.,

Defendants.

TO: Attorneys for Defendants

PLEASE TAKE NOTICE that, upon the pleadings, all prior papers and proceedings heretofore had herein, the undersigned will move this Court in Chambers (Room 252), before the Honorable Edward R. Neaher, United States District Judge, at the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on March 24, 1986, or at such other date as may be set by the Court,

Under Rule 3(j), Civil Rules for the Eastern District of New York, for reargument (or an order directing reargument) of the Court's decision in its Memorandum and Order dated February 28, 1986 (the "Court's Decision") limited to the Court's holding (on page 10) that "the Court has done absolutely nothing to prevent plaintiffs

Appendix D

The within motion is denied.

s/ Edward R. Neaher
U.S.D.J.

Dated: March 17, 1986.

APPENDIX E—ENDORSED ORDER OF THE DISTRICT COURT DATED APRIL 8, 1986 DENYING PETITIONERS-ATTORNEYS' REQUEST FOR RULE 60(b) RELIEF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 Civ. 4268 (ERN)

MICHAEL M. RAND, et al.,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., et al.,

Defendants.

NOTICE OF MOTION

TO: Attorneys for Defendants

PLEASE TAKE NOTICE that, upon the annexed affidavit of William C. Reid, sworn to March 17, 1986, and the pleadings all prior papers and proceedings heretofore had herein, the undersigned will move this Court in Chambers (Room 252), before the Honorable Edward R. Neaher, United States District Judge, at the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on Friday, March 28, 1986, or at such other date as may be set by the Court,

(i) For an order under Rules 60(b)(4) (void judgment) vacating the judgment entered in this action on March 7, 1986 against plaintiffs' attorneys;

Appendix E

(ii) In the alternative, and without waiving the argument that the judgment against plaintiffs' attorneys is void, for an order under Rule 62(d), F.R.Civ.P. or other applicable rule,

(a) fixing the amount of supersedeas bond to be posted and

(b) for a stay of execution of such judgment pending determination of plaintiffs' motion for reargument and pending any noticed appeal thereafter; and

Motion denied except to the extent of permitting plaintiffs to post a supersedeas bond in the sum of $20,000.00, pending determination of plaintiffs' appeal.

s/ Edward R. Neaher, U.S.D.J.

Dated: April 8, 1986

APPENDIX F—STIPULATION OF VOLUNTARY DISMISSAL OF PETITIONERS-ATTORNEYS' APPEAL, DATED APRIL 28, 1986, "SO ORDERED" BY THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY 83 cv 4268

NEAHER

Docket No. 86-7236

RAND

v

ANACONDA-ERICSSON

The undersigned hereby stipulate that the above entitled appeal is hereby withdrawn without costs and without attorneys' fees and without prejudice subject to reinstatement by written notice to the Clerk by 20 days after 2nd Cir. decides earlier appeal in this matter, 86-7034, and if not thus reinstated shall be deemed withdrawn with prejudice.

s/ Carl E. Person
CARL E. PERSON
Attorney for Appellants

Appendix F

SULLIVAN & CROMWELL
s/ Robinson B. Lacy
Attorney for Appellees
Anaconda-Ericsson Inc., Ericsson Inc., L.M. Ericsson Telephone Co., Sullivan & Cromwell, Richard Howe, Richard G. Lyon and L. Stanton Towne

WHITE & CASE
s/ Robert Morrow by R.B. Lacy
ROBERT MORROW
Attorneys to Nordic American Banking Corp.

SO ORDERED:
FOR THE COURT,

Dated: April 28, 1986

s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

Appendix F

7-20-05

D. Cosy ✓

Counsel: R. Osgood

R. Lyon

A. Hoopes

P. Hamlet

W Pennell

P. Sic Donaghi

C. Pusey

W. Reed

Camp ✓

Cal ✓

Jim ✓

Ben ✓

13

+ 2 TBD

15

APPENDIX G—NOTICE OF REINSTATEMENT OF APPEAL FILED JULY 28, 1986

LAW OFFICES
CARL E. PERSON
132 NASSAU STREET
NEW YORK, N.Y. 10038
(212) 349-4616

July 28, 1986

Elaine B. Goldsmith, Clerk
Court of Appeals for the Second Circuit
United States Courthouse
Foley Square
New York NY 10007

Re: Rand v. Anaconda-Ericsson
Docket No. 86-7236

Dear Ms. Goldsmith:

Pursuant to the stipulation filed April 28, 1986, we hereby file a Notice of Reinstatement of Appeal.

Very truly yours,

s/ Carl E. Person
Carl E. Person

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 86-7236

RAND V ANACONDA-ERICSSON, INC.

NOTICE OF REINSTATEMENT OF APPEAL

TO:

Elaine B. Goldsmith, Clerk
Court of Appeals for the Second Circuit
United States Courthouse
Foley Square
New York NY 10007

PLEASE TAKE NOTICE that pursuant to the stipulation filed April 28, 1986 (a copy of which is annexed hereto), we hereby give notice of the reinstatement of the above-captioned appeal. This notice is being filed within the 20 day period after the Second Circuit's decision in 86-7034 was filed. A motion for rehearing and request for rehearing in banc in 86-7034 were made but have not yet been decided.

Dated: July 28, 1986
New York, New York

s/ Carl E. Person
Carl E. Person, Appellant

s/ Walter C. Reid
Walter C. Reid, Appellant

APPENDIX H—ORDER OF THE COURT OF APPEALS' DISMISSING PETITIONERS-ATTORNEYS' APPEAL FILED SEPTEMBER 2, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7236

RAND

V.

ANACONDA-ERICSSON

NOTICE OF MOTION TO DISMISS THE APPEAL

ORDER

Before: Hon. Walter R. Mansfield, Hon. Lawrence W. Pierce and Hon. George C. Pratt, CJJ.

IT IS HEREBY ORDERED that the motion be and it is hereby GRANTED.

Elaine B. Goldsmith,
Clerk

s/ Edward J. Guardaro
By: Edward J. Guardaro,
Deputy Clerk.

September 2, 1986